NO. 82-

in the Supreme Court of the United States

October Term, 1982

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE,
an unincorporated association, and
MERLIN'S MUSIC, INC., a Florida Corporation,
Petitioners,

vs.

THE CITY OF HOMESTEAD, FLORIDA,
A Florida Municipal Corporation,
Respondents.

On Petition for Writ Of Certiorari
From The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

ORDINANCE NO. 80-04-28

AN EMERGENCY ORDINANCE OF THE CITY OF HOMESTEAD, FLORIDA, NECESSITATED BY CONSIDERATIONS OF THE HEALTH, SAFETY, AND WELFARE OF ITS CITIZENS AND INHABITANTS AMENDING CHAPTER 29, CODE OF LAWS, ENTITLED, "OFFENSES – MISCELLANEOUS", BY CREATING SECTIONS 29-58.1 THROUGH 29-58.5 TO PROHIBIT THE DISPLAY OR SALE OF INSTRUMENTS, SIMULATED DRUGS, SIMULATED CONTROLLED SUBSTANCES, OR OTHER NARCOTIC PARAPHERNALIA, PROVIDING A SEVERABILITY CLAUSE, AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City Council of the City of Homestead, Florida, has become very concerned about the increased use of illegal drugs and controlled substances within the City; and,

WHEREAS, the sale, advertisement and distribution of instruments, drug paraphernalia and simulated controlled substances, contribute to an atmosphere of community acceptance of illegal use of controlled substances; and

WHEREAS, the City Council finds that it is in the best interest of the health, safety and welfare, of the citizens of the City to restrict access to such drug paraphernalia;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOMESTEAD, DADE COUNTY, FLORIDA:

Section 1: That Chapter 29, Code of Laws, entitled "Offenses—Miscellaneous" be and is hereby amended by creating Sections 29-58.1 through 29-58.5 to read and provide as follows:

Sec. 29-58.1 Definitions.

A. "Controlled substance" means any drug or substance as described and defined in Florida Statutes Section 893.03, which is adopted by reference.

B. "Marijuana" means all parts of the plant of the species *Cannabis sativa, L.*, including all varieties thereof, whether growing or not; the seeds thereof, the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant which is incapable of germination.

C. "Person" means any individual natural person, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership or association or any other legal entity.

D. The term "Drug Paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this ordinance, or of any section of Chapter 893, Florida Statutes or Chapter 465, Florida Statutes. It includes, but is not limited to:

1. Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

2. Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances, or planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

3. Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

4. Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

5. Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

6. Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

7. Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

8. Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

9. Capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances;

10. Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

11. Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

12. Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing

marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chilams;

(l) Bongs;

(m) Ice pipes or chillers;

E. In determining whether an object is drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

1. Statements by an owner or by anyone in control of the object concerning its use;

2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

3. The proximity of the object, in time and space, to a direct violation of this ordinance;

4. The proximity of the object to controlled substances;

5. The existence of any residue of controlled substances on the object;

6. Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this ordinance; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this ordinance shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

7. Instructions, oral or written, provided with the object concerning its use;

8. Descriptive materials accompanying the object which explain or depict its use;

9. National and local advertising concerning its use;

10. The manner in which the object is displayed for sale;

11. Whether the owner, or anyone in control of the object, is a legitimate supplier or like or related items to the community, such as a licensed distributor or dealer of tobacco products;

12. Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

13. The existence and scope of legitimate uses for the object in the community;

14. Expert testimony concerning its use.

Sec. 29-58.2 Possession of Drug Paraphernalia.

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this ordinance.

Sec. 29-58.3 Manufacture or Delivery of Drug Paraphernalia.

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to

deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this ordinance.

Sec. 29-58.4 **Advertisement of Drug Paraphernalia.**

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonable should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

Sec. 29-58.5 **Penalty.**

Any person who violates any term, condition, or provision of Sec. 29-58.1 through 29-58.5 shall be liable, upon conviction by a court of competent jurisdiction, to a fine not to exceed Five Hundred Dollars ($500.00), or by imprisonment not to exceed ninety (90) days, or both, at the discretion of the court. Each day of violation of any term, provision, or condition of Secs. 29-58.1 through 29-58.5 shall constitute a separate and distinct offense.

Section 2: It is the intention of the City Council and it is hereby ordained that the provisions of this ordinance shall become and be made a part of the Code

of Laws of the City of Homestead, Florida, and the sections of this ordinance may be renumbered to accomplish such intention.

Section 3: If any word, phrase, clause, subsection or section of this ordinance is for any reason held unconstitutional or invalid, the invalidity thereof shall not affect the validity of any remaining portions of this ordinance.

Section 4: That all sections or parts of sections of the Code of Laws, all ordinances or parts of ordinances, and all resolutions or parts of resolutions, in conflict herewith, be and the same are hereby repealed to the extent of such conflict.

Section 5: That this ordinance shall take effect upon becoming a law.

PASSED AND ADOPTED this 21st day of April, 1980.

/s/ [illegible]
Mayor-Councilman
APPROVED AS TO FORM
AND CORRECTNESS:

/s/ [illegible]
City Attorney

ATTEST:

/s/ [illegible]
City Clerk
(Deputy)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-1160-Civ-JCP

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida corporation,

Plaintiffs,

vs.

THE CITY OF HOMESTEAD, FLORIDA, a Florida municipal corporation, NICHOLAS R. SINCORE, individually and as Mayor of the City of Homestead, and WILLIAM F. DICKINSON, individually and as Vice-Mayor of the City of Homestead, Florida and RUTH L. CAMPBELL, WILLIAM M. McCONNELL, WALTER C. RUTZKE, WILLIAM TOMMY WILSON and IRVING PESKOE, all individually as members of the City Council of the City of Homestead, Florida,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY RELIEF AND COMPENSATORY AND PUNITIVE DAMAGES

The Plaintiffs, FLORIDA BUSINESSMEN FOR FREE ENTERPRISE and MERLIN'S MUSIC, INC., by undersigned counsel, bring this action and state:

Jurisdiction

Count I of this Complaint is an action for declaratory relief, pursuant to 28 U.S. Code §2201, and preliminary injunctive relief ancillary thereto. Jurisdiction is conferred upon this Court by 28 U.S. Code §§ 1331 and 1343.

Count II of this Complaint is an action for compensatory damages, costs and attorneys' fees pursuant to 42 U.S. Code §1983. Jurisdiction is conferred upon this Court by 28 U.S. Code §1343.

Count III of this Complaint is an action for compensatory and punitive damages, costs and attorneys' fees as against the individual defendants pursuant to 42 U.S. Code §1983. Jurisdiction is conferred upon this Court by 28 U.S. Code §1343.

The actions of the Defendants have caused the Plaintiffs herein to suffer a deprivation of rights guaranteed under the First, Fifth and Fourteenth Amendments to the United States Constitution, as well as financial damages in excess of $10,000, exclusive of interest and costs.

Parties

The Plaintiff FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, is an unincorporated association whose members engage in the wholesale and retail distribution of certain items in interstate commerce, throughout Florida in general and in the CITY OF HOMESTEAD, FLORIDA, in specific.

The Plaintiff MERLIN'S MUSIC, INC., is a Florida corporation which operates a retail establishment at 797 N. E. Eighth Street, Homestead, Florida. The Plaintiff MERLIN'S MUSIC, INC. sells items which constitute a part of interstate commerce and which may or may not be proscribed under Ordinance No. 80-04-28, enacted by the Defendant CITY OF HOMESTEAD, on April 21, 1980.

The Defendant CITY OF HOMESTEAD, is a incorporated municipality within the State of Florida. On April 21, 1980, the CITY OF HOMESTEAD enacted Ordinance No. 80-04-28, a true copy of which is attached hereto and by reference made a part hereof.

The Defendant NICHOLAS R. SINCORE, is the duly elected Mayor of the Defendant CITY OF HOMESTEAD, FLORIDA, a municipal corporation [hereinafter "HOMESTEAD"], and is a resident of Dade County, Florida.

The Defendant WILLIAM F. DICKINSON, is the duly elected Vice-Mayor of HOMESTEAD, and is a resident of Dade County, Florida.

The Defendants, RUTH L. CAMPBELL, WILLIAM J. McCONNELL, WALTER C. RUTZKE, WILLIAM TOMMY WILSON, and IRVING PESKOE, are duly elected members of the City Council of HOMESTEAD, and are residents of Dade County, Florida.

At all times material hereto, each and every Defendant was acting "under color of [a] statute, ordinance, regulation, custom or usage of . . ." the State of Florida.

COUNT I

1. This is an action seeking declaratory relief against the Defendant CITY OF HOMESTEAD, FLORIDA, pursuant to Title 28, U.S.C. §2201.

2. The purpose and effect of Ordinance No. 80-04-28 is to prohibit possession, sale, or advertisement of certain items described in the ordinance as "drug paraphernalia." This ordinance defines "drug paraphernalia," inter alia, as such innocuous and overridingly lawful items as scales, spoons, bowls, containers, envelopes, and other objects "intended" for the described, prohibited use.

3. Ordinance No. 80-04-28 prescribes a criminal penalty for the possession, delivery or advertisement of those items vaguely defined in the ordinance. Upon conviction, any person who violates this ordinance may be liable "to a fine not to exceed Five Hundred Dollars ($500.00), or by imprisonment not to exceed ninety (90) days, or both. . . ."

4. The Plaintiffs are in the business of selling, both at wholesale and retail, items of jewelry, smoking accessories, and other articles which are or may be proscribed by the vague and overbroad language of the challenged ordinance. Plaintiffs are, therefore, precluded from pursuing their lawful business by the enactment and enforcement of this ordinance. Additionally, the Plaintiffs are prohibited by the ordinance from advertising or communicating to the public those items which the Plaintiffs hold for resale.

5. The challenged ordinance violates the due process clause of the Fifth and Fourteenth Amendments

to the United States Constitution by virtue of both vagueness and overbreadth in its language. The language of the ordinance is overbroad in that it proscribes activity which is constitutionally protected, and thus, violates the Plaintiffs' rights under the First Amendment to the United States Constitution. Additionally, the ordinance's definitional sections are so broad as to proscribe the possession and/or sale of items whose uses are overwhelmingly legal, without any legitimate relationship between this proscription and the health, safety, welfare, or morals of the people of the CITY OF HOMESTEAD.

6. The challenged ordinance is very vague in that it does not provide the Plaintiffs, or any persons of ordinary intelligence, with the requisite warning of that conduct which will be considered illegal in order that the Plaintiffs, and others, may conform their conduct accordingly. Additionally, by failing to provide ascertainable standards for the inclusion or exclusion of items, the ordinance fails to provide sufficient guidelines for its enforcement, promoting arbitrary and capricious enforcement in violation of the Fourteenth Amendment to the United States Constitution.

7. Ordinance No. 80-04-28 is unconstitutional in that it creates an irrebuttable presumption that the proscribed items described as "drug paraphernalia" *will be* used for unlawful purposes. This presumption is neither true in fact, nor supportable in law, and therefore, violates the Plaintiffs' right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

8. The challenged ordinance precludes advertisement of items vaguely defined as "drug paraphernalia" and therefore has a chilling effect prohibited by, and is violative of, the First Amendment rights of the Plaintiffs herein and the public at large.

9. The challenged ordinance constitutes an impermissible burden on interstate commerce in violation of the Commerce Clause, Article I, Section 8 of the United States Constitution, and constitutes a denial of the Plaintiffs' right to pursue their livelihood in a lawful manner.

10. The Plaintiffs have fully and completely complied with Ordinance No. 80-04-28 pending this action, in order to avoid criminal prosecution. The Plaintiffs have in the past, and are now, suffering irreparable harm and injury through the expenditure of large sums of money to separate, transport, and store those items which may be proscribed; a loss of sales and income due to the inability to sell their lawful merchandise; and loss of customers due to the nonavailability of these and other items which the Plaintiff has been forced to remove from its inventory due to the vagueness of the definitional sections of the challenged ordinance.

11. The Plaintiffs have in the past and continue to suffer the substantial and real threat of imminent prosecution through enforcement of the challenged ordinance as against the Plaintiffs, their agents and employees.

12. Lastly, Plaintiffs suffer a present inability to exercise their rights guaranteed under the First Amendment to the United States Constitution to

communicate with present and prospective customers concerning the items held for resale by the Plaintiffs, such restriction of First Amendment activities being irreparable harm and injury as a matter of law.

13. As an additional ground for the invalidity of the challenged ordinance, the same was enacted as an "emergency" ordinance, without providing either notice to those whose businesses are affected or an opportunity to be heard prior to the enactment and vigorous enforcement of the ordinance. In fact, no emergency exists, nor has it ever existed, and the procedure utilized by THE CITY OF HOMESTEAD in enacting this ordinance is void under the Florida and United States Constitutions.

WHEREFORE, and by reason of the foregoing, the Plaintiffs pray this Honorable Court will take jurisdiction of the within cause and:

A. Issue an order declaring that Ordinance No. 80-04-28 is void and unenforceable as the same violates the United States Constitution.

B. Issue a final order declaring the challenged ordinance to be void and unenforceable.

C. Award Plaintiffs costs and attorneys' fees in this action.

D. Grant such other and further relief as the Court deems just and equitable.

COUNT II

14. This is an action for compensatory damages, costs and attorneys' fees by the Plaintiffs against the Defendant CITY OF HOMESTEAD, FLORIDA, a municipal corporation, and the individual Defendants in their capacities as officers, agents, or officials of the CITY OF HOMESTEAD, FLORIDA, a municipal corporation, pursuant to 42 U.S. Code §1983.

15. The Plaintiffs reallege each and every allegation set forth above, as if fully set forth herein.

16. As a result of the enactment and vigorous enforcement of the challenged ordinance by the Defendants, the wholesaler members of the Plaintiff FLORIDA BUSINESSMEN FOR FREE ENTERPRISE have suffered, and continue to suffer, the inability to transact lawful business within the CITY OF HOMESTEAD, FLORIDA. Additionally, the wholesaler members of FLORIDA BUSINESSMEN FOR FREE ENTERPRISE are being restrained from advertising and/or offering their lawful wares for sale within the CITY OF HOMESTEAD, all of which amounts to a loss of profits in excess of $10,000, exclusive of interest and costs.

17. The Plaintiff MERLIN'S MUSIC, INC., a Florida corporation, has suffered severe financial damage in excess of $10,000, exclusive of interest and costs, by virtue of the following facts:

a. The Plaintiff MERLIN'S MUSIC, INC., a Florida corporation [hereinafter "MERLIN'S"] has been forced

to expend large amounts of money in removing, crating, transporting, and storing items arguably within the prohibition contained in the challenged ordinance, pending the outcome of this litigation.

b. MERLIN'S is unable to effect the sale of lawful items to its customers, and therefore, has lost both its customers and its revenues as a direct result of the Defendants' actions. MERLIN'S has suffered a loss of net profits in excess of $10,000 as of June 1, 1980, and continues to suffer lost profits in excess of $10,000 per month as a result of the actions of the Defendants.

c. MERLIN'S is presently unable to advertise its wares for sale to its customers, and engage in other activities protected by the First Amendment to the United States Constitution, thus, aggrevating the loss of business and net income identified above.

18. Both of the Plaintiffs have been forced to retain undersigned counsel to represent them in this cause, and have obligated themselves to pay a reasonable fee for the services rendered. Additionally, each Plaintiff has been forced to expend funds for court costs and other expenses both reasonable and necessary to the prosecution of this action.

WHEREFORE, and by reason of the foregoing, the Plaintiffs pray this Honorable Court will take jurisdiction of the within cause and set a prompt time for final hearing, following which it will assess compensatory damages against the Defendants, jointly and severally, award costs, attorneys's fees and such other and further relief as the Court deems just and equitable.

COUNT III

19. This is an action seeking compensatory and punitive damages, costs and attorneys' fees against the individual Defendants NICHOLAS R. SINCORE, WILLIAM F. DICKINSON, RUTH L. CAMPBELL, WILLIAM McCONNELL, WALTER C. RUTZKE, WILLIAM TOMMY WILSON and IRVING PESKOE, pursuant to 42 U.S. Code §1983.

20. The Plaintiffs reallege each and every allegation set forth above as if fully set forth herein.

21. Following the enactment of Ordinance No. 80-04-28, by the Defendants, acting as the City Council for the CITY OF HOMESTEAD, a hearing was held on the Plaintiffs' Application for Preliminary Injunction. Following that hearing, and after hearing argument of counsel for the CITY OF HOMESTEAD, as well as counsel for the Plaintiffs herein, the Court determined that based upon the "case law and memorandum provided, the Court finds that there is a substantial likelihood of success on the merits for movant." By this finding, the Court indicated a substantial likelihood that the ordinance here challenged would be found unconstitutional following a trial on the merits.

22. Additionally, each individual Defendant was afforded the opportunity to review decisions from ten courts which have considered similar ordinances, each of which court has found the ordinance to be unconstitutional.

23. On Monday, June 2, 1980, the individual Defendants were apprised that the Plaintiff MERLIN'S

MUSIC, INC., a Florida corporation, and the Plaintiff FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, were being deprived of their constitutionally protected right to engage in their lawful business as a result of the enforcement of this ordinance, and were further apprised that the damages incurred as of the date of that meeting were in excess of $10,000. Each Defendant was additionally advised that the Plaintiffs' damages would continue each and every day that the ordinance remained in effect and enforced by their direction, notwithstanding the constitutional infirmity of the ordinance.

24. Further, the individual Defendants were apprised, both by counsel for the Plaintiffs and by counsel for the CITY OF HOMESTEAD that the ordinance was likely to be held unconstitutional.

25. Based upon the foregoing, and in malicious disregard for the constitutional rights of the Plaintiffs, the Defendants conspired and confederated together to continue to enforce this void and unconstitutional ordinance against the Plaintiffs, well-knowing that there was no basis in law for that action. Further, the Defendants specifically intended, by their actions, to impose the financial harm upon the Plaintiffs as more fully set forth in Count II of this Complaint.

26. These actions of the individual Defendants were taken, not pursuant to any lawful duties imposed upon them by virtue of their offices, but rather out of personal animosity towards the Plaintiff MERLIN'S MUSIC, INC. in specific and FLORIDA BUSINESSMEN FOR FREE ENTERPRISE in general, and in complete

disregard to their obligations to uphold the Constitution of the United States of America.

27. The actions of the Defendants have resulted in the financial harm set forth in Count II of this Complaint, each and every item of which was well-known to the individual Defendants, and specifically intended by them in taking the actions identified above.

WHEREFORE, and by reason of the foregoing, the Plaintiffs pray that this Honorable Court will take jurisdiction of the within cause, grant compensatory and punitive damages against the individual Defendants, along with costs, attorneys' fees and such other and further relief as the Court deems just and equitable.

SIMON, SCHINDLER & TRIPP, P.A.
Attorneys for Plaintiffs
1492 South Miami Avenue
Miami, Florida 33130
(305) 358-8611

By: /s/ Theodore L. Tripp, Jr.
THEODORE L. TRIPP, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Complaint for Declaratory Relief and Compensatory and Punitive Damages has been hand delivered to Royall P. Terry, City Attorney, 790 North Homestead Boulevard, Homestead, Florida 33030, this 5th day of June, 1980.

By: /s/ Theodore L. Tripp, Jr.
THEODORE L. TRIPP, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-1160-Civ-JCP

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida corporation,

Plaintiffs,

vs.

THE CITY OF HOMESTEAD, FLORIDA, a Florida municipal corporation, NICHOLAS R. SINCORE, individually and as Mayor of the City of Homestead, Florida, and WILLIAM T. DICKINSON, individually and as Vice-Mayor of the City of Homestead, Florida and RUTH L. CAMPBELL, WILLIAM F. McCONNELL, WILLIAM TOMMY WILSON, WALTER RUTZKE, and IRVING PESKOE, all individually and as Council of the City of Homestead, Florida,

Defendants.

MOTION FOR SUMMARY JUDGMENT AS TO COUNT I, AND ESTABLISHING LIABILITY AS TO COUNT II

The Plaintiffs, FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida corporation, through undersigned counsel and pursuant to Rule 56, Federal Rules of Civil Procedure, present this Motion for Summary Judgment and state:

1. The pleadings in this cause, specifically the sworn Application for Preliminary Injunction previously filed herein, affirmatively disclose that there is no dispute as to the following material facts:

a. The Defendant CITY OF HOMESTEAD, is a duly incorporated city in the State of Florida. On April 21, 1980, the City Council for the CITY OF HOMESTEAD enacted Ordinance No. 80-04-28 [a true copy of which is attached hereto and by reference made a part hereof]. The purpose and effect of such ordinance is to prohibit the possession, delivery or advertisement of certain items described in the ordinance as "drug paraphernalia." The ordinance defines as "drug paraphernalia," inter alia, scales, spoons, bowls, containers, envelopes and other objects intended for the described prohibited use. The challenged ordinance carries a criminal penalty for the possession, delivery or advertisement of those items vaguely defined in the ordinance. THE CITY OF HOMESTEAD has declared its avowed intention to vigorously enforce, and is in fact, vigorously enforcing the challenged ordinance.

b. The Plaintiff FLORIDA BUSINESSMEN FOR FREE ENTERPRISE is an unincorporated association of wholesalers and retail businessmen doing business throughout Florida and in the CITY OF HOMESTEAD. The wholesaler members of Plaintiff FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, are in the business of selling to retail outlets merchandise which may or may not be prohibited by the vague and overbroad language of the challenged ordinance, and are therefore deprived of their right to engage in a lawful business. The members of the Plaintiff FLORIDA BUSINESSMEN, who are in the retail business of

selling objects arguably prohibited under the challenged ordinance, are prohibited by the ordinance from obtaining, advertising, or selling said merchandise, which severely diminishes their income and viability of their businesses and essentially curtails many of their retail business establishments.

c. The Plaintiff MERLIN'S MUSIC, INC. [hereinafter "THE STORE"] is in the business of selling gift items. THE STORE is a small record shop located in a shopping center at 797 N.E. Eighth Street, Homestead, Florida. THE STORE carries records, posters, and certain novelty items which may come within the ambit of the challenged ordinance. The removal of the latter items from Plaintiff's shop, in compliance with the ordinance results in a substantial loss of income to Plaintiff.

d. On May 14, 1980, the Plaintiffs filed a Complaint in this Court seeking declaratory and injunctive relief challenging the constitutionality of Ordinance No. 80-04-28, enacted and enforced by the CITY OF HOMESTEAD.

e. The Plaintiffs are, and since the effective date of enforcement have been, suffering substantial harm through the loss of business and substantial income as the direct result of the enactment and threat of imminent enforcement of the challenged ordinance. THE STORE has physically crated and removed a large percentage of its inventory from the place of business, because the language is so vague that Plaintiffs have been forced to remove all merchandise which arguably comes within the ambit of the ordinance. The Plaintiff

THE STORE, for example, expended a great deal of time, money, and effort to pack, move, and store all of the containers, spoons, jewelry, scales, mirrors, and bowls, among other items, which may arguably be prohibited by the challenged ordinance, in order to avoid criminal prosecution. All of the Plaintiffs continue to suffer a substantial loss of income, business, and customers due to compliance with the ordinance, which may result in bankruptcy. Furthermore, the ordinance's prohibition against advertising certain items constitutes a denial of First Amendment rights which even for minimal periods of time constitutes irreparable harm.

2. By reason of the authorities cited in the accompanying Memorandum of Law, the challenged ordinance is unconstitutional on its face, and the Defendant CITY OF HOMESTEAD is liable for the damages incurred by the enactment and enforcement thereof by the CITY against the Plaintiffs, as a matter of law.

3. Based upon the foregoing facts, as to which there is no dispute among the parties, the Plaintiffs are entitled to a Summary Judgment as to the liability of the Defendant CITY OF HOMESTEAD, as a matter of law, for the damages incurred by the Plaintiffs as a result of the enactment and enforcement of this ordinance by the Defendant CITY OF HOMESTEAD.

WHEREFORE, and by reason of the foregoing, the Plaintiffs pray this Honorable Court will enter an Order on Counts I and II, pursuant to Rule 56(d), Federal Rules of Civil Procedure, establishing the liability of the Defendant CITY OF HOMESTEAD, as a matter of law, for any damages suffered by the Plaintiffs as a result of the enactment and enforcement of this ordinance

by the Defendant CITY OF HOMESTEAD, and declaring the ordinance to be void and unconstitutional.

I HEREBY CERTIFY that a true copy of the foregoing Motion for Summary Judgment As to Count I, and Establishing Liability as to Count II has been furnished by hand delivery to Royall P. Terry, Jr., City Attorney, 790 North Homestead Boulevard, Homestead, Florida 33030, this 5th day of June, 1980.

SIMON, SCHINDLER
& TRIPP, P.A.
Attorneys for Plaintiffs
1492 South Miami Avenue
Miami, Florida 33130
(305) 358-8611

By: _____
THEODORE L. TRIPP, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO. 80-1160-Civ-NCR

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, etc., et. al.,

Plaintiffs,

vs.

THE CITY OF HOMESTEAD, etc., et al.,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, by and through their undersigned attorneys, and pursuant to Rule 56, Federal Rules of Civil Procedure, move for the entry of an order granting Summary Judgment, and as grounds therefore would state:

1) That Plaintiffs have filed a three count Amended Complaint in this cause seeking (a) a declaratory judgment ruling that Defendant, CITY OF HOMESTEAD'S, Oridnance Number 80-04-28 is unconstitutional; (b) compensatory damages for Defendant CITY OF HOMESTEAD; and (c) compensatory and punitive damages from the individual Defendant public officials.

2) That by reason of the authorities cited in the accompanying Memorandum of Law, the challenged ordinance is constitutional on its face.

3) That there is no genuine issue of fact, and all Defendants are entitled to summary judgment as a matter of law.

WHEREFORE, Defendants request that the Court enter summary judgment in favor of all Defendants herein, pursuant to Rule 56, Federal Rules of Civil Procedure, upholding the constitutionality of CITY OF HOMESTEAD Ordinance Number 80-04-28; Defendants further move for the entry of an order taxing their costs and attorneys fees against the Plaintiffs.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of September, 1980, to: THEODORE L. TRIPP, JR., ESQUIRE, ATTORNEY FOR PLAINTIFFS, 1492 SOUTH MIAMI AVENUE, MIAMI, FLORIDA 33130; ROYALL P. TERRY, CITY ATTORNEY, 790 N. HOMESTEAD BLVD., HOMESTEAD, FLORIDA 33030.

KUVIN, KLINGENSMITH
& LEWIS, P.A.
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[Filed FEB 26, 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 80-1160-Civ-NCR

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association and MERLIN'S MUSIC INC.,

Plaintiffs,

Vs.

THE CITY OF HOMESTEAD, FLORIDA, etc.,

Defendants

ORDER GRANTING SUMMARY JUDGEMENT

This cause came on for oral argument on defendant's motion for summary judgement.

After a review of the record, and after considering the arguments advanced by counsel at oral argument, the Court is not persuaded that there are material facts at issue in this cause of sufficient gravity to warrant a finding that is not identical to *Florida Businessmen for Free Enterprise v. The City of Fort Lauderdale, et al.*, No. 80-6157-Civ-NCR. Plaintiffs' allegations of "selective enforcement," "discriminatory intent," and "systematic design" to harass are simply not supported in the record. Therefore the Drug Paraphrenalia Ordinance, as construed in *The City of*

Fort Lauderdale, is not repugnant to the United States Constitution. Accordingly, it is

ORDERED and ADJUDGED that summary judgement is hereby entered for defendants as against plaintiffs.

DONE and ORDERED this 25th day of Feb, 1981.

/s/ [illegible]
UNITED STATES DISTRICT JUDGE

CC: Simon, Schindler & Tripp
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[Received MAR 4 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 80-1160-Civ-NCR

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association and MERLIN'S MUSIC, INC.

vs.

THE CITY OF HOMESTEAD, FLORIDA, etc.

THIS CAUSE is before the court on motion of plaintiff to correct clerical error.

Upon consideration of the record, it is

ORDERED AND ADJUDGED that said motion is hereby granted. It is

FURTHER ORDERED that the order granting summary judgment in this cause where it refers to Case No. 80-1657-Civ-NCR is hereby amended to provide that the correct style of No. 80-6157-Civ-NCR is *FLORIDA*

BUSINESSMEN FOR FREE ENTERPRISE vs. THE CITY OF HOLLYWOOD.

DONE AND ORDERED this 3 day of April, 1981.

/s/ [illegible]
U.S. District Judge

cc: Simon, Schindler & Tripp
Kuvin, Klingensmith & Lewis PA

[Received APR 7 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 80-6157-Civ-NCR

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association; and M. P. D'ERRICO & SONS, FLORIDA, INC., a Florida corporation, d/b/a DANDYLION HUT

Plaintiffs

vs.

THE CITY OF HOLLYWOOD, a Florida municipal corporation

Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on for oral argument on cross-motions for summary judgment.

Plaintiffs commenced this action pursuant to 42 U.S.C. §1983 seeking a temporary restraining order, preliminary injunction, and permanent injunction to enjoin the enforcement of the City of Hollywood's ordinance No. 0-80-15, amending Chapter 21 of the City Code, which was enacted on February 20, 1980. Plaintiffs' motion for a temporary restraining order was denied and the application for a preliminary injunction was consolidated with the trial on the merits on an expedited basis, pursuant to Fed. R. Civ. P. 65(a)(2). The parties stipulated that there are no material facts at issue and that the court need only resolve the legal issues presented.

At the hearing on the merits the court requested and received supplemental memoranda. After a review of the record and after consideration of the arguments advanced by counsel, the court enters this order as its findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

HOLLYWOOD'S ORDINANCE

The city of Hollywood, Florida has recently enacted ordinance 0-80-15 (hereinafter "the ordinance"),[1] which has the avowed purpose of restricting public access to drug paraphenalia. The ordinance is based upon the "Model Drug Paraphernalia Act" (hereinafter M.D.P.A.) drafted by the Drug Enforcement Administration of the United States Department of Justice.

The ordinance prohibits the possession of drug paraphernalia, Sec. 21-81, the manufacture or delivery of drug paraphernalia, Sec. 21-82, and the placing of advertisements promoting the sale of drug paraphernalia, Sec. 21-83. Each violation of the ordinance is punishable by a maximum fine of five hundred dollars ($500), or by imprisonment not to exceed ninety (90) days, or both.

Because the ordinance seeks to restrict possession, distribution, and advertisement of drug paraphernalia, its definition of drug paraphernalia is critical. In pertinent part it provides:

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[1]Hollywood's ordinance No. 0-8-15 is set out in the appendix of this order.

> The term "Drug Paraphernalia" means all equipment, products and materials of any kind which are *used, intended for use,* or *designed for use* in planting, propating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this ordinance. Section 21-80 (emphasis added).

Supplementing the definitional section is a seemingly endless, but not exclusive, list of items covered by the ordinance, Sec. 21-80 (A)(1)—(12)(M). Additionally, there are fourteen factors which are set forth intended, along with "other logically relevant factors", to aid in the determination of whether an object is drug paraphernalia within the meaning of the ordinance. Sec. 21-80(B)(1)—(14).

Section 21-82, which proscribes the manufacture and delivery of drug paraphernalia, and Section 21-83, which proscribes advertisement of drug paraphernalia, punish those acts where they are knowingly done. Additionally, a violation of the ordinance has occurred where one "reasonably should know" that an object will be employed in the preparation, processing, or consumption of a controlled substance, and a violation has occurred where one has placed an advertisement in the media, where one "reasonably should know that the purpose of the advertisement . . . is to promote the sale" of prohibited objects.

THE CHALLENGES

Plaintiffs are individuals who own the Dandylion Hut, a Hollywood business establishment which sells prohibited objects, and Florida Businessmen for Free Enterprise, an unincorporated association.

Plaintiffs attack the ordinance on three fronts; they allege that the ordinance is vague, that it is overbroad, and that it contravenes the First Amendment's guaranty of freedom of speech. Defendant strenuously argues that the ordinance is valid in its entirety, and that it is not repugnant to any right secured by the Constitution.

As a preliminary observation the court notes that abstention is not appropriate in this cause in light of the Fifth Circuit's holding in *High Ol' Times Inc. v. Busbee*, ____ F.2d ____ , No. 78-2192 (July 9, 1980). In *High Ol' Times*, the court concluded that the district court had erred in abstaining from considering the validity of the Georgia drug paraphernalia statute. Here, as in *High Ol' Times*, the issues "are all questions of federal constitutional law; there are simply no difficult, obscure, or unclear issues of state law." *Id.* at 7096. Nor is there an "ongoing state scheme or regulatory program involved here such that a federal ruling might engender confusion . . ." *Id.*

In recognition of the incidence of drug use and dependence, particularly among the young, states and individual communities have recently passed laws endeavoring to stem the tide. Hollywood's ordinance is typical in this respect. However, it is atypical in that it

is based upon the M.D.P.A. drafted by the federal Drug Enforcement Administration. The court will therefore not essay at great length on the other types of ordinances which have been challenged, except to note that they have been invalidated generally for sweeping too broadly;[2] a cannon is not sufferable where an arrow will suffice.

This opinion will scrutinize those cases in which the M.D.P.A. or statutes very similar to the M.D.P.A. have been construed in light of similar challenges. A perusal of the relevant authority confirms this court's initial analysis; the M.D.P.A., and therefore Hollywood's ordinance when given the reasonable and proper interpretation is not repugnant to the Due Process Clause and the First Amendment.

In general, legislative enactments which are vague do not provide notice to the ordinary person of what conduct is proscribed, nor are law enforcement officers provided with standards for enforcement. "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly . . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who review them." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294-2298, 33 L.Ed. 2d 218, 222-223 (1972) (notes omitted).

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[2] *See generally, Knoedler v. Roxbury Township*, 485 F.Supp. 990 (D.N.J. 1980); *Bambu Sales, Inc. v. Gekson*, 474 F.Supp. 1297 (D.N.J. 1979); *Music Stop, Inc. v. City of Ferndale*, ____ F.Supp. ____ (E.D. Mich. 1980).

Additionally, overbreadth is also repugnant to the constitution because it deters privileged activity. *Id.*

The Eighth Circuit applied the vagueness standards as articulated in *Grayned v. City of Rockford* in *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980), and invalidated an ordinance which prohibited possession and sale of "drug-related devices." *Id.* at 28. However, in a footnote, the court noted that the M.D.P.A., as contrasted with the invalidated ordinance, is a "properly drawn ordinance." *Id.* at 28, n.4. The court's comments are, of course, dicta; however, it illustrates the judicial recognition of the narrowness of the M.D.P.A.

The M.D.P.A. has recently passed judicial muster in *Record Revolution, No. 6, Inc. v. City of Parma*, ____ F.Supp. ____, No. (80-35) (N.D. Ohio April 14, 1980). There the court concluded that the statute was valid, but it struck a portion of the complaint for vagueness. It reasoned that the indicium, "whether the owner or anyone in control of the object is a legitimate supplier . . .", is vague because there "are no guidelines as to what constitutes legitimacy." However, this court concludes that none of the indicia set forth in Section 21-80 (B)(1)-(14) are vague. The indicium directed to the issue of "legitimacy" is supplemented by an example. It is clear that this indicium attempts to distinguish "head shops", the subject of the ordinance, from other retail establishments which might sell objects with both innocent and prohibited uses. An ordinance need not be drafted with absolute certainty; the appropriate criteria is whether it is drafted so that its meaning is reasonably apparent. *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1945).

As previously mentioned, two portions of the ordinance (Section 21-82 and 21-83) proscribe conduct where one actually knows or "reasonably should know", that a violation of the ordinance is ensuing. These sections impose criminal penalties where there is actual intent to commit the proscribed acts, as well as where one ought to be aware that one is facilitating an act proscribed by the ordinance. Although the courts in *Record Revolution No. 6 Inc. v. City of Parma, supra*, and *Knoedler v. Roxbury Township*, 485 F.Supp. 990 (D.N.J. 1980), invalidate portions of the ordinance imposing a "reasonably should have known standard" this court concludes that the standard is not unconstitutionally vague. In *World Imports, Inc. v. Woodbridge Township*, No. 80-1414 (D.N.J. June 20, 1980), the district court considering an ordinance based on the M.D.P.A. reasoned that "reasonably should know" standard does not significantly differ from the actual knowledge standard. The court considers this reasoning sound. When the statute is applied there is really no difference between the two standards.

The ordinance does present problems in its attempt to define and apply intent. While it clearly prohibits the manufacture, delivery, possession, and advertisement of "drug paraphernalia", the indicia set forth in section 21-80(B)(1)-(14) could arguably support the interpretation that a manufacturer who sells an object without intent to commit the acts proscribed is subject to prosecution if the shopowner or the purchaser intends it for use as drug paraphernalia. A similar conclusion could be reached with regard to the shopowner who sells an object without intent to commit the acts proscribed. And further, an innocent purchaser might be subject to prosecution for

the acts and statements of those who distribute the item. Similarly, a person using an item described in section 21-80 (12)(A)-(M) without intent to use the item as drug paraphernalia would be subject to prosecution. These interpretations of the ordinance would not survive judicial scrutiny.

The more reasonable and plausible meaning and the one implicit in the ordinance, is that each defendant charged with violating the ordinance must have general criminal intent with respect to the offense alleged (as previously discussed "reasonably should have known" will suffice). As the court in *Record Revolution No. 6, Inc. v. City of Parma, supra,* stated:

> There are three forms of state of mind on which the definition of drug paraphernalia turns: "[A]ll equipment, products and materials of any kind which are (1) *used,* (2) *intended for use;* or (3) *designed for use* . . . in introducing into the human body . . . controlled substances. . . . The court construes each of these three elements as requiring the existence of general criminal intent by the defendant. Thus the criminal defendants voluntary and intentional use of an item with illegal drugs makes it drug paraphernalia within the meaning of the ordinance. Similarly, if the defendant intends an item for use with illegal drugs or designs for that use the item is drug paraphernalia. Adding the element of general intent not only narrows the scope of the ordinance, it insures that no one will be convicted because of mistake, accident or other innocent reason. For example,

> if a person smokes marijuana from a pipe believing it contains tobacco, he could not be convicted of using drug paraphernalia. . . . Similarly, if a person smokes tobacco in a waterpipe which was designed for use with drug paraphernalia because he did not intend to use the pipe to ingest an illegal controlled substance. *Id.* at 11.

This court is informed that the Sixth Circuit has stayed the judgment in *Record Revolution No. 6, Inc. v. City of Parma* pending consideration of the appeal filed by the plaintiffs in that case. Nevertheless, this court considers the district court's findings and logic sound, and it supports this court's conclusions. Additionally, the district court in *World Imports, Inc. v. Woodbridge Township, supra*, reached precisely the same result.

PROHIBITION OF ADVERTISING

Plaintiffs have argued that the ordinance's alleged overbreadth violates their First Amendment rights. Initially, plaintiff suggests that symbolic speech is prohibited by the ordinance. *See generally, Tinker v. Des Moines*, 393 U.S. 503, 21 L.Ed. 2d 731, 89 S.Ct. 733 (1969). As previously discussed, the court has concluded that general criminal intent is required before it can be said that a violation of the ordinance has occurred. Therefore, one intending to promote and express a political position does not have the requisite criminal intent to commit a proscribed act.

Speech which does no more than "propose a commercial transaction" is entitled to First Amendment protection. *Virginia State Board of Pharmacy v. Virginia*

Citizens Council, Inc., 425 U.S. 748, 761, 96 S.Ct. 1817, 1825 (1976). However, speech which solicits illegal activity is not protected. *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553 (1978). The justification for protection of commercial speech is that the free flow of commercial information benefits of the public. *Virginia State Board of Pharmacy, supra*, clearly, however, the free flow of information concerning drug paraphernalia has a potentially deleterious effect upon the community. Having concluded that the ordinance is valid and that the possession, manufacture, and delivery of drug paraphernalia can be proscribed, a logical corollary is that advertising intended to "promote the sale of objects designed or intended for use as drug paraphernalia" can be prohibited.

CONCLUSION

There can be little doubt that communities have a valid interest in preventing the proliferation of drug paraphernalia. This court believes and holds that the Model Drug Paraphernalia Act adopted in the City of Hollywood's Ordinance No. 0-80-15 as construed in this order, validly serves the community's interest and does not infringe upon rights secured by the Constitution.

Accordingly, it is

ORDERED AND ADJUDGED that defendant's motion for summary judgment shall be and is hereby granted.

DONE AND ORDERED this 29 day of August, 1980.

/s/ [illegible]
U S District Judge

attachment

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cc- Sherman Bennett Mayor, Esq.
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FLORIDA BUSINESSMEN FOR FREE ENTERPRISE,
Plaintiffs-Appellants,

v.

The CITY OF HOLLYWOOD,
Defendant-Appellee.

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an incorporated association, High Quality Headquarters, Inc., a Florida Corp., Three Guys Distributors, Inc., a Florida Corp., and Correct Count Co., Inc., a New York Corp.,
Plaintiffs-Appellants, Cross-Appellees,

v.

The STATE OF FLORIDA Jim Smith, as Attorney General of the State of Florida, Kenneth Katsaris, as a representative of the class of Defendants being the sixty-seven duly elected Sheriffs of the State of Florida, and Harry Morrison, etc.,
Defendants-Appellees, Cross-Appellants.

Nos. 80-5769, 80-5813.

United States Court of Appeals,
Eleventh Circuit.

April 23, 1982.

Consolidated appeals were taken by merchants from a judgment of the United States District Court for the Northern District of Florida, at Tallahassee,

Lynn C. Higby, J., upholding state "head shop" law, and a judgment of the United States District Court for the Southern District of Florida, at Ft. Lauderdale, Norman C. Roettger, Jr., J., upholding a similar ordinance. The Court of Appeals, Hatchett, Circuit Judge, held, inter alia, that: (1) the scope of advertising provisions of state and city "head shop" laws, which forbid placing in any publication "any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia," does not embrace protected noncommercial speech; (2) the respective laws' definition of drug paraphernalia as items "designed for use" with controlled substances gave fair notice of which items fall within the statutory prohibition; the phrase "designed for use" refers to structural features of objects deemed inherently fashioned for drug use, the intent implicated is that of the designer, and such intent is reflected by the objective physical characteristics of the finished product; and (3) the phrase "reasonably should know" in the respective laws was not impermissibly vague.

Affirmed.

See also, Fifth Circuit, 648 F.2d 956.

1. Constitutional Law—82(4)

Reviewing court will sustain a facial overbreadth challenge if the enactment reaches a substantial amount of constitutionally protected conduct engaged in by the complainant or others.

2. Drugs and Narcotics—46

Municipal Corporations—594(1)

Scope of the advertising provisions of state and city "head shop" laws, which forbid placing in any publication "any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia," does not embrace protected non-commercial speech. West's F.S.A. §893.147(4).

3. Constitutional Law—90.1(1)

Drugs and Narcotics—43

Municipal Corporations—594(1)

Insofar as any commercial speech interest was implicated by the ban of state and city "head shop" laws on advertisements promoting the sale of drug paraphernalia, the enactments were directed towards commercial activity promoting or encouraging illegal drug use, speech that is not entitled to First Amendment protection. West's F.S.A. §893.147(4); U.S.C.A.Const. Amend. 14.

4. Constitutional Law—90.1(1)

Although speech which merely proposes a commercial transaction is entitled to First Amendment protection, the government may regulate or ban entirely

commercial speech related to illegal activity. U.S.C.A. Const.Amend. 1.

5. Drugs and Narcotics—43

An enactment is not overbroad merely because it may encompass "innocent" and "lawful" uses of items as well as uses with illegal drugs.

6. Statutes—47

A law which does not impinge upon constitutionally protected conduct and thus survives an overbreadth claim may nevertheless suffer from vagueness.

7. Drugs and Narcotics—43

Municipal Corporations—594(2)

To succeed on their facial vagueness challenge to state and city "head shop" laws, merchants had to demonstrate that the statute and ordinance were impermissibly vague in all of their applications. West's F.S.A. §§ 893.145-893.147.

8. Constitutional Law—258(2)

Two basic requirements comprise the Fourteenth Amendment due process guarantee against vague statutes: laws must provide fair warning to persons of ordinary intelligence of the persons covered and the conduct prohibited, and must provide ascertainable standards of guilt to protect against arbitrary, erratic and discriminatory enforcement. U.S.C.A.Const.Amend. 14.

9. Constitutional Law—60

Without sufficiently precise standards in statutes, the legislature impermissibly delegates basic policy decisions to the personal predilections of police, prosecutors, and juries.

10. Criminal Law—13.1(1)

Statutes defining criminal offenses must be drawn with a greater degree of precision.

11. Drugs and Narcotics—43

Municipal Corporations—594(1)

State and city "head shop" laws' definition of drug paraphernalia as items "designed for use" with controlled substances gave fair notice of which items fall within the statutory prohibition; the phrase refers to structural features of objects deemed inherently fashioned for drug use, the intent implicated is that of the designer, and such intent is reflected by the objective physical characteristics of the finished product. West's F.S.A. §893.147(4).

12. Drugs and Narcotics—46

Municipal Corporations—594(1)

In respect to state and city "head shop" laws, the three states of mind on which the definition of drug paraphernalia relies, namely, "used," "intended for use," or "designed for use," require proof of general criminal intent of the accused. West's F.S.A. §893.147(4).

13. Drugs and Narcotics—43

Municipal Corporations—594(2)

In respect to state and city "head shop" laws prohibiting the use, possession with intent to use, delivery, possession with intent to deliver, and the manufacture with intent to deliver drug paraphernalia "knowing or under circumstances where one reasonably should know" that the recipient will use the paraphernalia with controlled substances, the phrase "reasonably should know" is not impermissibly vague. West's F.S.A. §893.147(4).

14. Criminal Law—568

Proof that a defendant reasonably should have known something is established in substantially the same manner as actual knowledge.

15. Constitutional Law—257.5

Municipal Corporations—121

While the risk of discriminatory enforcement inherent in the "legitimate supplier" language of state and city "head shop" laws is more than slight, merchants could raise such due process claim only in a postenforcement proceeding where they might attempt to show that the ordinance and statute were being enforced in an unconstitutional manner. West's F.S.A. §893.146(10).

16. Drugs and Narcotics—43

Municipal Corporations—594(2)

While merchants argued, in respect to state and city "head shop" laws, that the "design for use" and "reasonably should know" standards in the definition of drug paraphernalia and the legitimate supplier indicium were insufficiently explicit to prevent arbitrary enforcement, the ordinance and statute were drafted with sufficient specificity that this speculative danger of discriminatory and arbitrary enforcement could not render the laws void for vagueness. West's F.S.A. §§ 893.145-893.147.

17. Constitutional Law—46(1)

A facial challenge to the constitutionality of the subject drug paraphernalia enactments was not the appropriate time for litigating claims of selective enforcement; rather, such a claim could only be raised in a postenforcement proceeding when the possibility of selective enforcement had ripened into a prosecution.

Appeals from the United States District Court for the Northern District of Florida.

Appeal from the United States District Court for the Southern District of Florida.

Before THORNBERRY*, FAY and HATCHETT, Circuit Judges.

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*Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

HATCHETT, Circuit Judge:

This consolidated appeal involves a review of the constitutionality of drug paraphernalia laws enacted by the State of Florida and the City of Hollywood to curb the increased incidence of drug abuse. The District Court for the Northern District of Florida upheld the state "head shop" law, but declared unconstitutionally vague and severed a portion of the statute prohibiting mere possession of drug paraphernalia. The District Court for the Southern District of Florida upheld a city ordinance which defines drug paraphernalia and prohibits its possession, manufacture, or sale in Hollywood. We affirm both decisions.

I. BACKGROUND

A. *Proceedings Below*

Appellants, Florida Businessmen for Free Enterprise, High Quality Headquarters, Inc., and Correct Count Company, Inc. (hereinafter State Merchants), as representatives of a plaintiff class of manufacturers, distributors, and retailers of arguably outlawed items, sought injunctive and declaratory relief from enforcement of Florida's allegedly unconstitutionally vague and overbroad "head shop" law. The United States District Court for the Northern District of Florida granted the state's motion to dismiss and certified defendants Katsaris, Sheriff of Leon County, and Morrison, State's Attorney for the Second Judicial Circuit of Florida, as representatives of the defendant class solely for the purpose of restraint by injunction. The court declared a provision of the statute unconstitutional, upheld the

remainder and issued a stay and injunction pending appeal prohibiting enforcement of the law in its entirety.

Appellants, Florida Businessmen for Free Enterprise and M. P. D'Errico & Sons, Florida, Inc. (hereinafter Hollywood Merchants), sought declaratory and injunctive relief in the District Court for the Southern District of Florida from the enforcement of an allegedly unconstitutionally vague and overbroad ordinance of the City of Hollywood, Florida. The district court denied the Hollywood Merchants' motion for a temporary restraining order, and pursuant to Rule 65(a)(2), Fed.R.Civ.P., consolidated the hearing on the preliminary injunction with the trial on the merits. On cross-motions for summary judgment, the district court upheld the ordinance under the fourteenth amendment due process clause and the first amendment and denied the Hollywood Merchants' motion for a stay pending appeal. A panel of the Fifth Circuit entered an injunction pending appeal precluding enforcement of the ordinance.

B. *The Drug Paraphernalia Laws*

The state head shop law, Fla.Stat. §§ 893.145-.147 (Supp.1982), like its city ordinance counterpart, is modelled after the Model Drug Paraphernalia Act (MDPA) (1975), drafted by the Drug Enforcement Administration of the United States Department of Justice. *See* Appendix A (setting forth text of state statute). Unlike the Hollywood ordinance and the MDPA, however, the state law mandates consideration of thirteen factors in determining whether an object is drug paraphernalia, whereas consideration of these same factors in the Hollywood ordinance and the MDPA is discretionary.

Hollywood, Florida, Ordinance No. 0-80-15 (Feb. 20, 1980), prohibits the use, possession with intent to use, manufacture, delivery, and advertisement of drug paraphernalia. *See* Appendix B (reprinting text of ordinance). "Drug paraphernalia" is defined as all items "used, intended for use, or designed for use" with controlled substances. A non-exclusive list of items within the ambit of the ordinance supplements the definitional section. The ordinance also permits consideration of fourteen factors in addition to "other logically relevant factors" in determining whether an object is drug paraphernalia. Section 21-82, which proscribes the manufacture and delivery of drug paraphernalia, and section 21-83, which proscribes the advertisement of drug paraphernalia, punishes the commission of those acts by one who knows or "reasonably should know" that the object will be used with illicit drugs or that the advertisement's purpose is to promote the sale of prohibited drug paraphernalia.

II. ISSUES

We must consider (1) whether the definition of "drug paraphernalia" and the prohibition against advertising drug paraphernalia is unconstitutionally overbroad; and (2) whether the definition of "drug paraphernalia" and the scienter requirement in these laws are impermissibly vague.**

**On cross appeal, the State argues that the District Court for the Northern District of Florida abused its discretion in declining to abstain or defer to state courts prior to declaring the provision proscribing mere possession unconstitutional. The subsequent amendment of Fla. Stat. §893.147(1) (Supp.1982) to prohibit possession *with intent to use* drug paraphernalia renders this issue moot on appeal.

III. *Overbreadth*

The State and Hollywood Merchants argue that the statute and ordinance are unconstitutionally overbroad because of the broad definition of drug paraphernalia. Specifically, they contend that the "designed for use" standard sweeps into its proscription a myriad of otherwise innocent and lawful objects. They also assert that the "reasonably should know" standard of knowledge is unconstitutional because it inhibits constitutionally protected conduct. The Merchants further argue that the ban against advertising drug paraphernalia impermissibly infringes "protected commercial speech" and "protected political speech" debating drug paraphernalia laws and the use of drugs.

[1] A reviewing court will sustain a facial overbreadth challenge if the enactment reaches "a substantial amount of constitutionally protected conduct" engaged in by the complainant or others. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ___ U.S. ___, ___, 102 S.Ct. 1186, 1189 91, 71 L.Ed.2d ___ (1982).

[2] Both the State and the Hollywood "head shop" laws forbid placing in any publication "any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia." Fla.Stat. §893.147(4) (Supp.1982); Hollywood, Florida, Ordinance No. 0-80-15, §21-83 (Feb. 20, 1980). We initially consider whether this provision infringes upon the first amendment rights of the Merchants or of others. This section is narrowly drawn to prohibit advertising

promoting the sale of "drug paraphernalia" within the meaning of the head shop laws. It does not address advertisements commenting upon the wisdom or efficiency of these laws nor upon any other matter. This provision does not regulate "speech as such, but simply regulates the commercial marketing of items that . . . may be used for an illicit purpose." *Flipside*, at ____, 102 S.Ct. at 1191. We therefore hold that the scope of the advertising provisions does not embrace protected noncommercial speech.

[3, 4] Insofar as the ban implicates any commercial speech interest, we note that the enactments here are directed towards commercial activity promoting or encouraging illegal drug use. Although speech which merely "propose[s] a commercial transaction" is entitled to first amendment protection, the government may regulate or ban entirely commercial speech related to illegal activity. *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 761, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 2350-51, 65 L.Ed.2d 341 (1980); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). The justification for protecting commercial speech is that the free flow of information in advertising benefits the public. *Virginia State Board of Pharmacy*, 425 U.S. 763-64, 96 S.Ct. 1826-27. As the district court noted in the instant case, however,

> the free flow of information concerning drug paraphernalia has a potentially deleterious effect upon the community. Having concluded that the

ordinance is valid and that the possession, manufacture, and delivery of drug paraphernalia can be proscribed, a logical corollary is that advertising intended to 'promote the sale of objects designed or intended for use as drug paraphernalia' can be prohibited.

[5] *Flipside* also decided that an enactment is not overbroad merely because it may encompass "innocent" and "lawful" uses of items as well as uses with illegal drugs. ____ U.S. at ____ n.9, 102 S.Ct. at 1192 n.9. The Merchants' assertion that they cannot ascertain whether the statute and ordinance regulate items with some lawful uses addresses vagueness. In *Flipside*, the Court deemed such a complaint premature in a preenforcement facial challenge. at ____ n.9, 102 S.Ct. at 1192 n.9. The Court also characterized the assertion that the provision would inhibit innocent uses of covered items as a complaint of denial of substantive due process, devoid of merit. At ____ n.9, 102 S.Ct. at 1192 n.9. The Court stated: "A retailer's right to sell smoking accessories, and a purchaser's right to buy and use them are entitled only to minimal due process protection. . . . Regulation of items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use." At ____ n.9, 102 S.Ct. at 1192 n.9 (citations omitted).

IV. VAGUENESS

[6, 7] A law which does not impinge upon constitutionally protected conduct and thus survives an overbreadth claim may nevertheless suffer from vagueness. To succeed on their facial vagueness challenge, however, the Merchants must demonstrate that the

statute and the ordinance are impermissibly vague in all of their applications. *Flipside*, at ____, 102 S.Ct. at 1191.

[8-10] Two basic requirements comprise the fourteenth amendment due process guarantee against vague statutes: Laws must provide fair warning to persons of ordinary intelligence of the persons covered and the conduct prohibited and must provide ascertainable standards of guilt to protect against arbitrary, erratic, and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). Without sufficiently precise standards in statutes, the legislature impermissibly delegates basic policy decisions to the personal predilections of police, prosecutors, and juries. *Smith v. Goguen*, 415 U.S. 566, 576, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 (1976). Further, statutes defining criminal offenses must be drawn with a greater degree of precision. *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1945). The State and Hollywood Merchants contend that certain phraseology in the Hollywood ordinance and the Florida statute violates these constitutional criteria.

A. *Fair Notice*

1. *"Designed for Use."*

[11] Quoting extensively from *Indiana Chapter, NORML v. Sendak*, 631 F.2d 734 (7th Cir. 1980), the Merchants argue that the definition of drug paraphernalia as items "designed for use" with controlled substances

fails to give fair notice of which items fall within the statutory prohibition. Specifically, they assert that the definition is unclear with respect to whether prohibited devices must be suited solely for drug use or may encompass multi-purpose objects which include legitimate uses. The Merchants also criticize the phrase as unconstitutionally ambiguous for failing to precisely state who is intended as designer. The Merchants thus argue that this language permits an accused to be prosecuted and convicted based on the transferred intent of another.

Like the trial courts in the instant cases, numerous courts have upheld "designed for use" language against similar challenges. *See, e.g., The Casbah, Inc. v. Thone,* 651 F.2d 551, 559-60 (8th Cir. 1981), *cert. denied,* ____ U.S. ____, ____ S.Ct. ____, 71 L.Ed.2d ____, 50 U.S.L.W. 3713 (U.S. Mar. 8, 1982); *Mid-Atlantic Accessories Trade Association v. Maryland,* 500 F.Supp. 834, 844-45 (D.Md.1980); *Delaware Accessories Trade Association v. Gebelein,* 497 F.Supp. 289, 291-92 (D.Del.1980). The United States Supreme Court recently decided that "designed for use" language is not unconstitutionally vague on its face. The Court held that this standard encompasses items principally used with illegal drugs as determined by the objective physical features of the object in conjunction with the intent or plan of the manufacturer. *Flipside,* ____ U.S. at ____, 102 S.Ct. at 1193 (1982). The Court stated that:

> [A] business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer. It is also sufficiently clear that items

which are principally used for nondrug purposes, such as ordinary pipes, are not 'designed for use' with illegal drugs.

At ____, 102 S.Ct. at 1193.

[12] We therefore hold that the phrase "designed for use" refers to structural features of objects deemed inherently fashioned for drug use and that the intent implicated is that of the designer (i.e., patent holder or manufacturer). We further hold that the designer's intent for a design is reflected by the objective physical characteristics of the finished product. To ensure that defendants will not be convicted based on the transferred intent of others, we also note that the three states of mind on which the definition of drug paraphernalia relies—(1) "used," (2) "intended for use," or (3) "designed for use"—require proof of general criminal intent of the accused. *See, The Casbah, Inc. v. Thone*, 651 F.2d 551, 559 (8th Cir. 1981), *cert. denied*, ____ U.S. ____, ____ S.Ct. ____, 71 L.Ed.2d ____, 50 U.S.L.W. 3713 (U.S. Mar. 8, 1982); *Delaware Accessories Trade Association v. Gebelein*, 497 F.Supp. 289, 292-93 (D.Del.1980); *Record Revolution No. 6, Inc. v. City of Parma*, 492 F.Supp. 1157, 1169-70 (N.D.Ohio), *rev'd*, 638 F.2d 916, 928 & n.14 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 103, 101 S.Ct. 2998, 69 L.Ed.2d 384 (1981).

2. *"Reasonably Should Know."*

[13] The Hollywood and Florida Merchants also argue that the "reasonably should know" language in the sections defining substantive offenses is vague. The Hollywood ordinance prohibits the use, possession

with intent to use, the delivery, the possession with intent to deliver, and the manufacture with intent to deliver drug paraphernalia "knowing or under circumstances where one reasonably should know" that the recipient will use the paraphernalia with controlled substances. Hollywood, Fla., Ordinance No. 0-80-15, §21-82. The Florida Statute contains the same prohibitions. Both laws further prohibit any advertising "under circumstances where one reasonably should know" that the purpose of the advertisement is to promote the sale of objects designed or intended for use with drug paraphernalia. Fla.Stat. §893.147(4) (Supp.1982); Hollywood, Fla., Ordinance No. 0-80-15, §21-83 (Feb. 20, 1980). Both trial courts in the instant case held that the "reasonably should know" language was constitutionally permissible. The Hollywood and State Merchants argue, however, that this constructive knowledge standard lacks a specific intent requirement and thus fails to give notice to innocent persons of what constitutes prohibited conduct.

[14] We hold that the phrase "reasonably should know" is not impermissibly vague and adopt the reasoning advanced by the district courts. We note that proof that a defendant reasonably should have known something is established in substantially the same manner as actual knowledge. "Even if someone testifies that he told a defendant something, the defendant's knowledge may be inferred only if the trier of fact proves that the defendant heard, understood, and believes what he was told." *World Imports, Inc. v. Woodbridge Township*, 493 F.Supp. 428, 433 (D.N.J.1980).

Further support is found in the many statutes imposing criminal liability under a "reasonably should

know" standard and which have withstood constitutional attack. *See, e.g., The Casbah, Inc. v. Thone*, 651 F.2d at 561 n.13 (collecting federal statutes). Florida courts also have construed this standard to require proof that "the circumstances of the transaction were sufficiently suspicious to put a person of ordinary intelligence and caution on inquiry." *Hutton v. State*, 332 So.2d 686, 687 (Fla.Dist.Ct.App.1976); *B. S. v. State*, 320 So.2d 459, 461 (Fla.Dist.Ct.App.1975).

We also hold that this standard is sufficiently certain to provide fair notice to persons of ordinary intelligence of its meaning and application. *See Gorin v. United States*, 312 U.S. 19, 27-28, 61 S.Ct. 429, 433-434, 85 L.Ed. 488 (1941); *United States v. Featherston*, 461 F.2d 1119, 1121-22 (5th Cir. 1972). The "reasonably should know" standard does not punish innocent or inadvertent conduct but establishes a scienter requirement that the defendant acted in bad faith, with intent or knowledge that the recipient will use the paraphernalia with controlled substances.

3. *Factors Relevant to Determining Drug Paraphernalia: "Legitimate Supplier".*

Section 21-80B in the ordinance and section 893.146 in the statute lists fourteen and thirteen indicia, respectively, that law enforcement authorities must consider in determining whether an object is "drug paraphernalia." In this appeal, the Merchants attack only the factor of being "a legitimate supplier" as vague and overbroad. The relevant provision states:

> In determining whether an object is drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:
>
> . . .
>
> 11. Whether the owner, or anyone in control of the object, is a *legitimate supplier* of like or related items to the commodity, such as a licensed distributor or dealer of tobacco products . . . .

Hollywood, Fla., Ordinance No. 0-80-15, §21-80B(11) (Feb. 20, 1980) (emphasis added); *accord* Fla.Stat. §893.146(10) (Supp. 1982).

The district court upheld this provision in the Hollywood ordinance, stating that the "legitimate supplier" guideline "is supplemented by an example. It is clear that this indicium attempts to distinguish 'head shops,' the subject of the ordinance, from other retail establishments which might sell objects with both innocent and prohibited uses." The court in *Record Revolution No. 6 v. City of Parma*, however, deleted this same provision from the three ordinances reviewed for creating a danger of arbitrary and discriminatory enforcement. 638 F.2d 916 at 933 n.24. The district court therein stated that the reference to "legitimate suppliers" is imprecise and misleading because the ordinance applies to *all* who use, distribute, or advertise even an innocent item with the requisite intent. 492 F.Supp. 1157, 1171 (N.D.Ohio 1980).

[15] We agree that the risk of discriminatory enforcement inherent in this language is more than

slight. Nevertheless, we hold that appellants may raise this due process claim only in a post-enforcement proceeding where they may attempt to show that the ordinance and the statute are being enforced in an unconstitutional manner.

B. *Adequacy of Standards for Enforcement*

[16] The Merchants also assert that the "designed for use" and "reasonably should know" standards in the definition of drug paraphernalia and the legitimate supplier indicium are insufficiently explicit to prevent arbitrary enforcement. This imprecision, appellants argue, will foster selective enforcement only against "head shops" by police and prosecutors "who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance."

[17] We hold that the ordinance and statute here were drafted with sufficient specificity that this speculative danger of discriminatory and arbitrary enforcement cannot render the ordinance void for vagueness. The Merchants have introduced no evidence indicative of discriminatory enforcement. A facial challenge to the constitutionality of the subject drug paraphernalia enactments is not the appropriate time for litigating claims of selective enforcement. Regardless of the risk of discriminatory enforcement, the Merchants may raise this claim only in a post-enforcement proceeding when the possibility of selective enforcement has "ripen[ed] into a prosecution." *Flipside*, ____ U.S. ____ at ____ nn.21 & 22, 102 S.Ct. at 1196 nn.21 & 22. Such abstract claims of discriminatory enforcement possess due process implications only when bolstered by specific applications of the drug paraphernalia laws.

VI. CONCLUSION

We hold that these drug paraphernalia laws enacted by the State of Florida and the City of Hollywood are neither unconstitutionally vague nor overbroad.

We now dissolve all injunctions entered in these consolidated cases.

AFFIRMED.

APPENDIX A

Fla.Stat. §§ 893.145-.147 (Supp.1982)

893.145 *"Drug Paraphernalia" defined*

The term "drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. Drug paraphernalia is deemed to be contraband which shall be subject to civil forfeiture. The term includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances.

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.

(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.

(9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.

(11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes, with or without screens, permanent screens, hashish heads, or punctured metal bowls.

(b) Water pipes.

(c) Carburetion tubes and devices.

(d) Smoking and carburetion masks.

(e) Roach clips: meaning objects used to holding burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.

(f) Miniature cocaine spoons, and cocaine vials.

(g) Chamber pipes.

(h) Carburetor pipes.

(i) Electric pipes.

(j) Air-driven pipes.

(k) Chillums.

(l) Bongs.

(m) Ice pipes or chillers.

893.146 *Determination of paraphernalia*

In determining whether an object is drug paraphernalia, a court or other authority or jury shall consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use.

(2) The proximity of the object, in time and space, to a direct violation of this act.

(3) The proximity of the object to controlled substances.

(4) The existence of any residue of controlled substances on the object.

(5) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.

(6) Instructions, oral or written, provided with the object concerning its use.

(7) Descriptive materials accompanying the object which explain or depict its use.

(8) Any advertising concerning its use.

(9) The manner in which the object is displayed for sale.

(10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor of or dealer of tobacco products.

(11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.

(12) The existence and scope of legitimate uses for the object in the community.

(13) Expert testimony concerning its use.

893.147 *Use, possession, manufacture, delivery, or advertisement of drug paraphernalia*

(1) *Use or possession of drug paraphernalia.* — It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia:

(a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or

conceal, a controlled substance in violation of this chapter; or

(b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

Any person who violates this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) *Manufacture or delivery of drug paraphernalia.* —It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used:

(a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this act; or

(b) To inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this act.

Any person who violates this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) *Delivery of drug paraphernalia to a minor.* —Any person 18 years of age or over who violates subsection (2) by delivering drug paraphernalia to a

person under 18 years of age is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) *Advertisement of drug paraphernalia.*—It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

APPENDIX B

ORDINANCE NO. 0-80-15

AN ORDINANCE OF THE CITY OF HOLLYWOOD, FLORIDA, AMENDING CHAPTER 21, CODE OF ORDINANCES, ENTITLED, "OFFENSES, MISCELLANEOUS PROVISIONS", BY CREATING SECTIONS 21-80 THROUGH 21-84 THEREOF, TO PROHIBIT THE DISPLAY OR SALE OF INSTRUMENTS, SIMULATED DRUGS, SIMULATED CONTROLLED SUBSTANCES, OR OTHER NARCOTIC PARAPHERNALIA, PROVIDING A SEVERABILITY CLAUSE, AND PROVIDING AN EFFECTIVE DATE

WHEREAS, the City Commission of the City of Hollywood, Florida, has become very concerned about the increased use of illegal drugs and controlled substances within the City; and

WHEREAS, the sale, advertisement and distribution of instruments, drug paraphernalia and simulated controlled substances, contribute to an atmosphere of community acceptance of illegal use of controlled substances; and

WHEREAS, the City Commission finds that it is in the best interest of the health, safety and welfare, of the citizens of the City to restrict access to such drug paraphernalia;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF HOLLYWOOD, FLORIDA:

Section 1: That Chapter 21, Code of Ordinances, entitled "Offenses, Miscellaneous Provisions" is amended by creating Sections 21-89 through 21-84 to read and provide as follows:

Sec. 21-80. *Definitions.*

A. The term "Drug Paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this ordinance. It includes, but is not limited to:

1. Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or

harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

2. Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

3. Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

4. Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

5. Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

6. Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

7. Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

8. Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

9. Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

10. Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

11. Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

12. Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to holding burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs;

(m) Ice pipes or chillers.

B. In determining whether an object is drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

1. Statements by an owner or by anyone in control of the object concerning its use;

2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

3. The proximity of the object, in time and space, to a direct violation of this ordinance;

4. The proximity of the object to controlled substances;

5. The existence of any residue of controlled substances on the object;

6. Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to

deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this ordinance; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this ordinance shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

7. Instructions, oral or written, provided with the object concerning its use;

9. National and local advertising concerning its use;

10. The manner in which the object is displayed for sale;

11. Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

12. Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

13. The existence and scope of legitimate uses for the object in the community;

14. Expert testimony concerning its use.

Sec. 21-81. *Possession of Drug Paraphernalia.*

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate,

cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this ordinance.

Sec. 21-82. *Manufacture or Delivery of Drug Paraphernalia.*

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this ordinance.

Sec. 21-83. *Advertisement of Drug Paraphernalia.*

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

Sec. 21-84. *Penalty.*

Any person who violates any term, condition, or provision of Secs. 21-81 through 21-83 shall be liable,

upon conviction by a court of competent jurisdiction, to a fine not to exceed Five Hundred Dollars ($500.00), or by imprisonment not to exceed ninety (90) days, or both, at the discretion of the court. Each day of violation of any term, provision, or condition of Secs. 21-81 through 21-83 shall constitute a separate and distinct offense.

Section 2: It is the intention of the City Commission and it is hereby ordained that the provisions of this ordinance shall become and be made a part of the Code of Ordinances of the City of Hollywood, Florida, and the sections of this ordinance may be renumbered to accomplish such intention.

Section 3: If any word, phrase, clause, subsection or section of this ordinance is for any reason held unconstitutional or invalid, the invalidity thereof shall not affect the validity of any remaining portions of this ordinance.

Section 4: That all sections or parts of sections of the Code of Ordinances, all ordinances or parts of ordinances, and all resolutions or parts of resolutions, in conflict herewith, be and the same are hereby repealed to the extent of such conflict.

Section 5: That this ordinance shall be in full force and effect immediately upon its passage and adoption.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-5701
Non-Argument Calendar

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE,
an unincorporated association, and
MERLIN'S MUSIC, INC., a Florida Corporation,
Plaintiffs-Appellants,

versus

THE CITY OF HOMESTEAD, FLORIDA,
A Florida Municipal Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

June 10, 1982

Before HILL, VANCE and HATCHETT, Circuit Judges.

PER CURIAM:

AFFIRMED. *See Florida Businessmen for Free Enterprise, Inc. v. Florida*, No. 80-5813 (11th Cir. Apr. 23, 1982); *Florida Businessmen for Free Enterprise, Inc. v. City of Hollywood*, No. 80-5769 (11th Cir. Apr. 23, 1982).